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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD M. BARANCIK

Petitioner,

v.

COUNTY OF MARIN,
a Subdivision of the State of California

Respondent.

PETITIONER'S REPLY MEMORANDUM

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

INTRODUCTION

In this cause Petitioner seeks a Writ of Certiorari to review a decision of the Ninth Circuit Court of Appeals holding that in an action brought under 42 U.S.C. § 1983 challenging an existing zoning classification, the cause of action accrues from the date the zoning classification was originally adopted, and not from the date the landowner's rezoning request was denied. The Ninth Circuit's time bar rule on this important question of federal law has such severe implications for property owners that Respondent's characterization of the question as "academic" is appalling and can only be described as disingenuous. As applied in Petitioner's case and as will be applied in all future cases,

property owners will be *forever* barred from challenging an existing zoning classification on its face and as it applies to their property vis a vis surrounding properties. If allowed to stand, the Ninth Circuit's decision will establish a federal rule that will encourage local governments to act with impunity, knowing that an unconstitutional ordinance which has been in existence for one year, can never be challenged. For property owners who sue under Section 1983 after denial of a development request, the court's time bar rule deprives them of all causes of action except an "as applied" substantive due process claim. This federal rule of time limitations thus undermines the fundamental purpose of the Civil Rights Act of 1871 which was to guarantee an *effective* means to redress deprivations of constitutional rights.

ARGUMENT

The Supreme Court is the national expounder of federal law. A court of appeals decision which establishes a federal statute of limitations rule under *Wilson v. Garcia*, 471 U.S. 261 (1985) that deprives a property owner of both facial and as applied causes of action to challenge a final development decision rendered by a local government, is an important federal question of national significance. No other federal circuit but the Ninth Circuit has articulated this draconian proposition of law under 42 U.S.C. §1983. Indeed, the Ninth Circuit's rule conflicts with at least two other circuits who have addressed the statute of limitations issue under 42 U.S.C. §1983. *See Ocean Acres Limited Partnership v. Dare County Board of Health*, 707 F.2d 103 (4th Cir. 1983); *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978). The Ninth Circuit's rejection of the applicability of the continuing wrong doctrine in the context of land use disputes places it alone and in conflict with these other circuits who have considered this question.

No other federal circuit has decided the federal statute of limitation question under 42 U.S.C. §1983 so as to deprive a plaintiff property owner of virtually all of his causes of action against the wrongful zoning of his property. The question to be reviewed is one of *general* importance to the rights of all property owners who seek to redress deprivations of their constitutional rights under the federal Civil Rights Act. Respondent's citation to *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959) are inapposite in that they merely stand for the unremarkable proposition that certiorari may be dismissed as improvidently granted if circumstances come to light which were not fully apprehended

at the time the certiorari was granted. *See The Monrosa v. Carbon Black Export, Inc., supra* at 183.[1]

The foregoing are all reasons which are "special and important" within language of Supreme Court Rule 17 for issuance of a writ. Respondent's effort to trivialize the national significance of this constitutional question is unavailing. Indeed, as Respondent well knows, Rule 17 by its own terms states that the considerations outlined in Rule 17 are neither "controlling nor fully measuring [of] the Court's discretion." Supreme Court Rule 17.1.

Moreover, it is nonsensical for Respondent to suggest that there is no fundamental doctrinal conflict between the Ninth Circuit's belated ruling in its amended opinion that Petitioner's claims were, in fact "ripe" for review, and its simultaneous barring of those same claims by an illogical statute of limitations rule under 42 U.S.C. § 1983. The clash of the Ninth Circuit's limitations rule under 42 U.S.C. § 1983 with the Supreme Court's ripeness doctrine can only be resolved by this Court serving as the final arbiter.[2]

The danger of allowing the Ninth Circuit's time bar rule to become established federal law is revealed in Respondent's incredible assertion at page 6 of its Brief that its regulations are *immune* from constitutional challenge so long as it does

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[1] Respondent also suggests, erroneously, that Petitioner has "abandoned" his claims on the merits, ignoring this Court's pronouncement in *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) that the purpose of a Petition for Certiorari is not to review a conflict of evidence and similar matters. It hardly follows, therefore, that Petitioner has abandoned these issues.

[2] The passage from *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986) cited by Respondent (Respondent's Brief p. 5) refers to a final determination of a specific development proposal. It hardly stands for the proposition that the County's rezoning of the Loma Alta Ranch in 1979, *before* Petitioner even purchased the property, should start the statute of limitations running. *See* Petition at p. 9 n. 5.

not initiate any change in those regulations as they apply to a landowner's property. Such a proposition of law strikes at the heart of this Court's pronouncement in *Village of Euclid, Ohio v. Ambler Realty Company*, 272 U.S. 365 (1926), that a landowner has a constitutional right to challenge a zoning ordinance which, by its mere existence, invades his or her property rights. *See also Terrace v. Thompson*, 263 U.S. 197 (1923).

The events outlined in the Petition from the record below, belie Respondent's attempt to suggest that its role during the five year dispute was "passive" throughout. *See* Petition, pp. 12-14. *See also Jordan v. Rocco*, 648 F.Supp. 942, 946 (N.D. Ohio 1986). Moreover, Respondent's citation to the California government Code outlawing discrimination by local units of government indicates an extraordinary failure to understand that the Civil Rights Act of 1871, 42 U.S.C. § 1983, was adopted by Congress to guarantee the effective enforcement of *constitutional rights*. This Court recently underscored this crucial distinction in *Felder v. Casey*, 487 U.S. ___, 101 L. Ed. 2d 123, 144 (1988), stating:

> [T]he dominant characteristic of civil rights actions [is that] *they belong in court*. "These causes of action," we have explained, "exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable *in the first instance*." (citations omitted) (emphasis, the Court's).

The time bar rule under 42 U.S.C. § 1983 established by the Ninth Circuit is a rule of constitutional dimension for jurisdictions throughout the circuit and potentially throughout the nation. For this reason, it is hardly adequate to cite to a local state remedy as ameliorating the constitutional deprivation suffered by property owners at the hands of local government—the very wrong which Congress intended to correct by its passage of the Civil Rights Act of 1871.[3]

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[3] See CONG. GLOBE, 42nd Cong., 1st Sess. at 334.

CONCLUSION

For all of the foregoing reasons Petitioner respectfully prays that this Honorable Court grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision in this case.

Respectfully submitted,

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